No. 90-259 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WILLIAM LOWARY, *et al.*,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

The decision below presents a direct conflict with several lower court decisions, and Respondents are particularly disingenuous in denying this fact. Cases conflicting with the decision below include *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir. 1988), *Gillespie v. Willard City Board of Education*, 700 F. Supp. 898 (N.D. Ohio 1987), *Jordan v. City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990) and *Toledo Federation of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989).

While conceding that complete restitution was awarded to the injured agency fee payors in all of the cases cited above, Respondents contend that these decisions are distinguishable because they "involved situations where, at the time of the decision, the union still had not established an acceptable procedure to determine the amount of the fair share fees properly owing." Respondents' ("Resp.") Brief at 10. While Respondents' characterization of those cases is correct, it ignores the fact that the same can be said of the instant case. Here, Respondents have *never* had a valid *Hudson* plan in place, *and they still do not*. The decision below struck down a major portion of Respondents' collection plan (the "local union presumption" provisions), and the district court has yet to approve a replacement plan which omits the "presumption" and provides fee payors with adequate financial disclosure.[1]

In short, Respondents' assertion that the cases providing complete restitution are not in conflict with those that refused this remedy is incredible.

II.

Respondents contend that *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 302 (1986) mandates the denial of a complete restitution remedy because it held that the objective of a valid pre-collection plan is "'to devise a way of preventing compulsory subsidization of ideological activity by employees who

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[1] Respondents' use of the "local union presumption" was found to violate *Hudson* because it permitted them to disseminate *no* audited financial information about the local and district affiliates, and thus keep agency fee payors "in the dark" about whether to object or not to the unions' fee calculations. *See Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir. 1990), citing *Hudson*, 475 U.S. at 306. Contrary to the assertions in Respondents' Brief at 13 n.9, the unions' use of the "local union presumption" clearly had an effect on the final amount that fee payors had to pay, because the lack of disclosure obviously dissuaded many nonunion employees from making any objection at all. Those employees who were dissuaded from objecting were charged 100% of dues by Respondents.

object thereto,' ... ' *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*' " Resp. Brief at 9, emphasis added by Respondents. This reading of *Hudson* is wide of the mark because the Court, 475 U.S. at 302, was referring to the purposes and goals to be considered when *future* plans were established. The Court, *id.*, was not discussing the remedy to be provided for *past* constitutional violations.

More instructive on the issue of complete restitution for past constitutional violations is *Hudson*, 475 U.S. at 309 n.22, where the Court stated that the "judicial remedy for a proven violation of law will often include commands that the law does not impose upon the community at large." Here, where three successive agency fee collection plans were struck down, there was not just "a proven violation," but three separate series of violations spanning three years. Thus, effective relief was certainly required. *See, e.g., United States v. Paradise*, 480 U.S. 149, ___, 107 S. Ct. 1053, 1078 (1987) (Stevens, J., concurring).

III.

Respondents assert that because this case is a challenge to the unions' "procedures," the lower courts were correct in deferring to the "arbitrator" on the "substantive" issues of the standards of chargeability and the amount of nonchargeable expenditures. This argument ignores the fact that as part of their "procedural" challenge to the agency fee seizures, Petitioners specifically challenged the standards of chargeability used by the unions; unfortunately, the district court refused to hear these challenges and blindly accepted the "arbitrator's" decision.[2] Yet,

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[2] Even when confronted with an argument that the arbitrator's decision was wrong as a matter of law, *see* Plaintiffs' Motion for Partial Reconsideration (District Court Docket No. 174, filed Oct. 23, 1987), the court refused to review that decision *under any circumstances*.

[note continued]

even Respondents recognize that these issues are properly within the jurisdiction of an Article III court. Resp. Brief at 13-14. Respondents' argument also ignores the fact that the unions' procedure is still invalid precisely because it uses erroneous definitions of chargeability (which invariably results in an erroneous chargeability determination). *Cf. Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989) (Merritt, J., dissenting), *cert. granted*, ___ U.S. ___, 110 S. Ct. 2616 (June 11,1990) (No. 89-1217).

In this respect, this case is closely analogous to *Lehnert v. Ferris Faculty Association*, Case No. 89-1217, in that these Petitioners, like those in *Lehnert*, challenged the chargeability standards used by the union. The problem here is that unlike *Lehnert*, the district court and court of appeals refused to decide these substantive issues, instead deferring to the ruling of a non-judicial "arbitrator" chosen pursuant to the terms of an unconstitutional agency fee collection plan. This was completely inappropriate under Article III of the United States Constitution and 42 U.S.C. § 1983. *See Felder v. Casey*, 487 U.S. 131, ___, 108 S. Ct. 2302, 2312 (1988).

In short, the lower courts were wrong in holding that challenges to the standards of chargeability, and to the ultimate

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> The Court's role in evaluating the present plan submitted by the [unions] was to determine whether it meets the constitutionally minimum standards of the first and fourteenth amendments and *not to resolve a claim that the chargeability decision is a correct one under the law. The Court has extinguished its duty to assure that a constitutionally minimum adequate plan is in place and finds that it is unnecessary to determine whether the impartial decisionmaker for the years 1985-86 and 1986-87 employed a proper standard.* Accordingly, the Court denies the plaintiffs' motion for reconsideration to the extent that it seeks to have the Court reconsider its decision on the standard of chargeability as outlined in the new plan.

Order Denying Plaintiffs' Motion for Partial Reconsideration (District Court Docket No. 176, filed Mar. 21, 1988) (emphasis added).

chargeability amount, could not be litigated in this 42 U.S.C. § 1983 case. The damages due in this civil rights lawsuit, which specifically challenged, *inter alia*, the standards and definitions of chargeability used by the unions, should have been determined solely by the district court, without abdication to an "arbitrator."

IV.

Finally, Respondents fail to discuss this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Division*, ___U.S.___, 110 S. Ct. 2238 (1990), even though the analysis in that case bears directly on the instant Petition. In *McKesson*, this Court held that where unconstitutional tax seizures occur, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward looking relief to rectify any unconstitutional deprivation." *Id.*, ___ U.S. at ___, 110 S. Ct. at 2247. *See* Petition at 9-10. The relief provided herein was not meaningful specifically because it failed to restore to Petitioners property that should never have been seized in the first place. *See Hudson*, 475 U.S. at 309 (disallowing all collections made in the absence of a valid procedure because "the agency shop itself impinges upon the nonunion employees' First Amendment interests"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987) (unions must "establish and maintain" a valid plan as a condition precedent to *any* agency fee seizures); *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir. 1988) (same).

Respondents also fail to note that this Court has granted a writ of certiorari in another case raising the restitution issues discussed in *McKesson*. *See James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 31 (June 11, 1990) (No. 89-680). Thus, the instant case poses obviously timely, important and recurring issues which should be heard by this Court.

CONCLUSION

For the reasons set forth herein, William Lowary and Sara Wyatt pray that this Court grant their Petition.

Respectfully submitted,

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